Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1334

THOMAS E. HAYDEN and JANE S. FONDA,
Petitioners

v.

NATIONAL SECURITY AGENCY/CENTRAL SECURITY SERVICE, ET AL.,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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February 28, 1980

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners Thomas E. Hayden and Jane S. Fonda pray for a writ of certiorari to issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case October 29, 1979.

Petitioners sought from the National Security Agency (NSA) all information pertaining to them and in NSA files. NSA

acknowledged having documents concerning the petitioners and based on interceptions of communications. The petitioners filed suit under the Freedom of Information Act and the trial court granted NSA's motion for summary judgment to keep the matters secret. The trial court upheld NSA's claims on the basis of FOIA exemption (b)(1) concerning properly classified matters, and exemption (b)(3) incorporating Public Law No. 86-36.

Given the fact that the communications at issue are conceded by NSA to be substantively nonsensitive, sent without encoding or other protection, and transmitted over commercial communications networks, the result of the ruling of the trial court as affirmed by the Court of Appeals is a virtual blanket exemption from the FOIA for the NSA.

OPINIONS BELOW

The opinion of the District Court is reported at 452 F.Supp. 247 (D.D.C.1978), reprinted in the Appendix at pages 23a-40a.

The opinion of the Court of Appeals is not yet published and is reprinted at Appendix, pages 1a-19a. The denial of a petition for rehearing is reprinted at Appendix, page 20a. The denial of a suggestion of an en banc hearing (4 judges voting to grant, 2 vacancies on the court) is reprinted at the Appendix, page 21a. An Order Staying the Mandate is reprinted in the Appendix, page 22a.

JURISDICTION

The judgment of the Court of Appeals was entered October 29, 1979. A petition for rehearing and suggestion of en banc hearing was denied January 9, 1980. The mandate was stayed by Order dated January 30, 1980. Jurisdiction is invoked under

28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the National Security Agency is entitled to a virtual blanket exemption from the requirements of the Freedom of Information Act, pursuant to either relevant Executive Orders on Classification or Public Law No. 86-36, §6.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves application of the Freedom of Information Act, 5 U.S.C. §552 (1976 ed.), reprinted at Appendix, pages 41a-43a , Public Law No. 86-36, §6, reprinted at Appendix, page 44a , and Federal Rule of Civil Procedure 54(e), reprinted at Appendix, page 45a .

STATEMENT OF THE CASE

Petitioners filed FOIA requests with NSA for all information respectively pertaining to them and in NSA files. NSA responded that it had intelligence reports in which they were mentioned but that the documents must be kept secret.

After exhausting administrative appeals, petitioners filed suit and a motion for consolidation was granted. Petitioners then moved for a more detailed itemization and indexing of the information withheld, as well as a more detailed justification. NSA provided a brief public affidavit alleging in conclusory fashion that the information must be kept secret because confirming the identity of individuals or organizations whose foreign communications had been intercepted would severely jeopardize the intelligence collection mission.

The trial court found the affidavit "insufficiently detailed" and granted

petitioners' motion which had not yet been acted upon. NSA did file an additional public affidavit, but it simultaneously moved for summary judgment, filed an accompanying affidavit of a person on the staff of the Director of Central Intelligence, and alternatively asked leave to submit a classified affidavit. The new public NSA affidavit again spoke in conclusory terms, relying alternatively on exemption (b)(1) and three allegedly exemption (b)(3) statutes--Pub. L. 86-36, 18 U.S.C.§798(a)(3), and 50 U.S.C.§403 (d)(3).

Petitioners filed a cross-motion for summary judgment and a motion for partial in camera review.

The trial judge subsequently granted leave to NSA to submit its classified affidavit.

After more than a year from the date of the filing of the cross-motions the

trial judge issued a ten page memorandum opinion and order granting summary judgment to NSA on the basis of exemption (b)(1) and Public Law 86-36. He found it unnecessary to discuss 18 U.S.C. §798(a)(3) (which petitioners had contended was subsumed within exemption (b)(1) because §798(a)(3) specifically referred to classified information) or 50 U.S.C.§403(d)(3)(which petitioners noted gave certain authority to only the Director of Central Intelligence who did not have the demonstrated expertise to make judgments for NSA, and who could certainly not be qualified to withhold NSA-originated information if NSA could not itself justify withholding).

After petitioners' appeal brief was filed startling new information came to light. In Baez v. National Security Agency, et al., Civil Action No. 76-1921 (D.D.C.) (in which instant petitioners' counsel

represent the plaintiff) the trial judge had also examined an in camera NSA affidavit and ordered release of all but two paragraphs. NSA had moved for partial amendment of that order (still pending), but NSA did comply in part and released four full pages (900 words) of what NSA described as nonsensitive background information being released pursuant to a "revised" agency policy. The released portion revealed for the first time that the communications intercepted had been sent in unencrypted (unencoded) form and without any other indicated protection and had been transmitted over commercial communications channels (e.g., international telegraph). Such interceptions had previously been discussed at length in public Congressional hearings.

This "revised" policy was short-lived. With a single exception to be discussed infra, NSA has steadfastly refused to respond to requests for similar elaboration in

every other NSA FOIA case of which counsel is aware. However, NSA was aware of the reliance petitioners had placed on an earlier ruling in Baez and their appeal counsel made similar admissions with respect to the communications at issue in this case. Such admissions were made in hearsay statements of counsel in the Government's opposition brief; NSA repeatedly refused to release those portions of the classified affidavit in this case.

Finally, several days prior to oral argument nearly a year later, NSA released a different portion of its classified affidavit which for the first time anywhere acknowledged that the communications at issue were, as had been suggested by petitioners' counsel, acquired during the Vietnam era "watchlist" program of NSA which had also been discussed at length during public Congressional hearings.

The heart of NSA's argument in support

of the need for continued secrecy (discussed in somewhat more detail infra) was that the targets of the communications interceptions at issue "probably" took no precautions when sending nonsensitive communications because they were unaware of NSA capabilities; petitioners countered that the more obvious reason was that the communications were nonsensitive and therefore no precautions were deemed needed. NSA's explanation cannot possibly be based on "personal knowledge" as required by the Rule on summary judgment; and petitioners submitted numerous samples of public information that would put targets on notice of NSA's likely capabilities with respect to the communications at issue.

Nevertheless, the panel simply set up "strawman" arguments to support its affirmance; the arguments, discussed infra, were irrelevant if in fact NSA's capabilities with respect to these communications is known. The panel also made a sweeping interpre-

tation of the scope of Public Law 86-36 that would enable NSA to keep secret even such abuses as were publicly reviewed and condemned by the Congress.

A timely petition for rehearing was denied. And a suggestion of en banc hearing was denied, with four of the nine sitting judges voting to grant an en banc hearing (there were two vacancies on the court pending).

The scope of the panel's sweeping ruling is perhaps most typified by the fact that it virtually authorized future secrecy of the very information released from the classified affidavit in Baez and which NSA conceded was not sensitive.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE COURT OF APPEALS GRANTS TO THE NATIONAL SECURITY AGENCY A VIRTUAL BLANKET EXEMPTION FROM THE REQUIREMENTS OF THE FREEDOM OF INFORMATION ACT (a) WHERE THE ONLY OBJECTIVE EVIDENCE IS THAT WHAT NSA CLAIMS IT SEEKS TO PROTECT IS ALREADY PUBLIC KNOWLEDGE AND THE CENTRAL ALLEGATION IN NSA'S AFFIDAVITS CANNOT BE BASED ON "PERSONAL KNOWLEDGE" AS REQUIRED BY RULE OF PROCEDURE 54(e), (b) THE COURT RELIED ON A STANDARD OF JUDICIAL REVIEW EXPRESSLY CONSIDERED AND REJECTED BY THE CONGRESS, AND (c) THERE IS NO CLEAR CONGRESSIONAL MANDATE FOR SUCH A BLANKET EXEMPTION. THE UNWILLINGNESS OF THE LOWER FEDERAL COURTS TO REVIEW NATIONAL SECURITY CLAIMS IN THE MANNER MANDATED BY THE CONGRESS IS MANIFEST.

The National Security Agency is the United States intelligence agency chiefly responsible for the interception of electromagnetic communications with at least one terminus outside the United States.

Seeking to withhold the information at issue pursuant to exemption (b)(1) of the Freedom of Information Act (FOIA) which authorizes concealment of matters which are "in fact" (procedurally and substantively)

properly classified, NSA presented a three point argument:

(a) it is necessary to conceal the nature and scope of NSA's ability to intercept various communications channels and to select-out particular items from among the tens of millions of communications it might intercept, lest the senders take precautions;

(b) the foregoing protection requires secrecy even in the instant case where NSA concedes that the communications intercepted and which are at issue were (i) substantively nonsensitive, (ii) sent in unencrypted (uncoded) form and without any other protection, (iii) over commercial communications channels (e.g., international commercial telegraph); and

(c) the reason that protection is needed in this instance is that the senders of the nonsensitive, unencrypted and commercially sent communications took no pre-

cautions "probably" because they were not aware of NSA's ability to select-out particular communications or information.

Obviously, the panel's ruling that information based on such nonsensitive, unprotected and commercially sent communications may be kept secret results in a blanket exemption for an agency whose mission it is to intercept communications;[1] NSA would certainly refuse to reveal substantively sensitive matters or those which would reveal that an encrypted (encoded) matter had been deciphered or that an otherwise protected channel had been breached.[2]

First, contrary to the requirements of Federal Rule of Civil Procedure 54(e), NSA's key contention is not based on "personal

1/ In at least three cases concerning NSA in which instant counsel represent the Plaintiff, NSA has relied on the panel's opinion. It can hardly be doubted that NSA similarly relies on the sweeping opinion in every case.

2/ NSA "processes" perhaps as many as 50 to 100 million classification actions per year, yet the agency has only two "authorized" classification officers. Improved Executive (Continued. . .)

knowledge" of the affiant--i.e., that foreign targets who sent the messages at issue "probably" took no precautions because they were not aware of NSA's likely capabilities.

Second, NSA's self-serving argument conveniently ignored the more logical reason the senders took no precautions, i.e., precisely because the communications were not sensitive; the senders assumed the risk of interception.[3] In fact, the only objective evidence in the record

2/(Continued. . .)
Branch Oversight Needed For The Government's National Security Information Classification Program, Report To The Congress By The Comptroller General, GAO Report LCD-78-125 (March 9, 1979).

3/ When queried by the panel at oral argument, counsel for petitioner emphasized that the nonsensitive nature of the communications would not always be determinative. The target might be particularly sensitive; or the topic of inquiry might be sensitive. But NSA made no such claims in the instant case. Counsel pointed out to the panel that had NSA made such a claim the requester and the trial judge could have focused on that claim as they do when other intelligence agencies seek to withhold information.

Responding to that argument the panel (Continued. . .)

supports the conclusion that NSA's capabilities with respect to the types of communications at issue in this case are generally known to the public. Petitioners cited a long list of public sources.[4/] The

3/(Continued. . .)
set up "strawmen"--i.e., that disclosure might reveal "information [such as] date, time, origin, or manner of transmission or receipt. . .," or that sensitive material might go out inadvertently over a clear channel." The first point is, of course, irrelevant to petitioners' argument that protection in these instances is simply no longer necessary. The second point is equally irrelevant since the term "inadvertently" means that the sender did not intend to use the particular channel under any circumstances and thus did not take into consideration whether or not it was secure, or the sender at least assumed the risk of his or her carelessness in view of the already public record of NSA's capabilities (see n.4 infra). In any event, in such an instance NSA could raise the sensitivity of the message as an arguable basis for withholding the information, and the litigation could focus on that issue.

4/For example; (a) NSA's HARVEST computer which can select-out communications which contain so-called "buzzwords" or key words for which the computer is programmed, and even communications intercepted because a participant's voiceprint has been programmed into the computer. Ford Rowan, Techno Spies (1978); (b) Congressional hearings discussing 30 years of routine NSA review
(Continued. . .)

relevance of such publications is not whether they are accurate but that they surely give potential targets sufficient warning of NSA's likely capabilities.

Third, the panel relied on a standard of judicial review expressly considered and rejected by the Congress--i.e., a "reasonable basis" for the agency's decision. 120 Cong. Rec. 17022-17030 (May 30, 1974). This legislative history had been thoroughly reviewed in the prior ruling in Ray, et al. v. Turner, 587 F.2d 1187, 1192-94 (D.C.Cir.1978).

4/(Continued. . .)
of all international electromagnetic communications. The National Security Agency And The Fourth Amendment, Vol. 5, Hearings Before The Select Committee To Study Governmental Operations With Respect To Intelligence Activities, U. S. Senate, 94th Cong., 1st Sess. (1975) at 57-59; and (c) defections to the U.S.S.R. of high level NSA personnel, and interceptions of the automobile telephone of former Soviet leader Kruschev. "Eavesdropping On The World's Secrets," June 26, 1978, U.S. News & World Report.

The panel's alternative basis for upholding NSA claims was exemption (b)(3) of the FOIA, incorporating Pub. L. 86-36 which authorizes withholding of

> . . . the organization or any function of the National Security Agency, of any information with respect to the activities thereof, or of the names, titles, salaries, or number of the persons employed by such agency.

The panel argued that "signals intelligence is one of the Agency's primary functions; [and] . . . any information about an intercepted communication concerns an NSA activity." (emphasis added). The panel concluded that "Nowhere in the legislative history of Public Law No. 86-36 does Congress express any intent to limit the effect of the clear statutory language." (emphasis added).

But in fact there is nothing "clear" about the reach of the terms "functions" or "activities": Public Law 86-36 was enacted as a routine exemption to the Civil Service laws; the House and Senate Reports are sparse

and there was no floor debate with respect to this statute which the panel would apply to give NSA a cloak of absolute secrecy. Exemptions to the FOIA must be narrowly construed. Department of The Air Force v. Rose, 425 U. S. 352, 361 (1976).

Might not "functions" or "activities", as defined by the panel, include racial discrimination in hiring, lobbying members of Congress, or the defection of NSA personnel to a foreign enemy?

Prompt consideration by this Court is necessary. As the seat of Government, an unusually large percentage of FOIA cases involving NSA are litigated in the District of Columbia Circuit. Petitioners' counsel are personally handling four, all of which will be bound by the panel's ruling.

Furthermore, the unwillingness of the federal courts to accept the Congressional mandate to oversee intelligence agency secrecy claims is manifest. For example,

in Bell v. United States, 563 F.2d 484 (1st Cir.1977), the panel upheld NSA's claim of secrecy for hundreds of thousands of pages of documents from the 30-year old World War II "ULTRA" communications interceptions, even though the court observed that NSA apparently acknowledged that much of the information need no longer be kept secret. In less than two years NSA in fact released hundreds of thousands of those pages.

In Weissman v. Central Intelligence Agency, et al., 184 U.S.App.D.C. 117, 565 F.2d 692 (1977), the original opinion expressly adopted the erroneous "reasonable basis" standard of judicial review discussed above. The error was deleted by amendment several months later. Nevertheless, at least three other appellate courts expressly relied on Weissman and a "reasonable basis" standard of review. Bell v. United States, supra; Maroscia v. Levi, et al., 569 F.2d 1000, 1003 (7th Cir.1977); DiViaio v. Kelly, et al., 571 F.2d 538, 543 (10th

Cir. 1978). To this day petitioners are unaware of any change in those opinions or any attempt by Government counsel responsible for litigating FOIA cases to bring the matter to the attention of those courts. It is the experience of petitioners' counsel that some offices of the United States Attorney as recently as a few months ago continued to use a Justice Department memorandum that quoted the erroneous, unamended version of Weissman.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the District of Columbia Circuit's opinion of October 29, 1979.

Respectfully submitted,

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APPENDIX

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 78-1728

THOMAS E. HAYDEN, APPELLANT

v.

NATIONAL SECURITY AGENCY/
CENTRAL SECURITY SERVICE, ET AL.

No. 78-1729

JANE S. FONDA, APPELLANT

v.

NATIONAL SECURITY AGENCY/
CENTRAL SECURITY SERVICE, ET AL.

Appeals from the United States District Court
for the District of Columbia
(D.C. Civil Action Nos. 76-0286 & 76-0287)

Argued 7 September 1979

Decided 29 October 1979

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Martin S. Echter, with whom *Ira M. Lowe* was on the brief, for appellants.

Freddi Lipstein, Attorney, Department of Justice, with whom *Earl J. Silbert*, United States Attorney, *Barbara Allen Babcock*, Assistant Attorney General, Department of Justice, and *Leonard Schaitman*, Attorney, Department of Justice, were on the brief, for appellees.

Daniel B. Silver and *Alfred C. Franklin* also entered an appearance for appellee.

Before: MACKINNON and WILKEY, *Circuit Judges*, and GORDON,* *Senior United States District Judge* for the Western District of Kentucky.

Opinion for the Court filed by *Circuit Judge* WILKEY.

WILKEY, *Circuit Judge*: This case raises a recurring problem in the Freedom of Information Act (FOIA), concerning the balance struck by Congress between the disclosure of information by government agencies and the need for secrecy in some operations vital to the national defense. Appellants challenge a district court order which granted summary judgment to the National Security Agency (NSA) on grounds that documents requested by appellants under the FOIA were exempt from disclosure. We find that the requested documents fall within two exemptions of the Freedom of Information Act, and thus U.S. District Judge Corcoran properly refused to order disclosure.

I. PROCEDURAL FACTS

Appellants Hayden and Fonda submitted FOIA requests to NSA for all materials pertaining to them that

* Sitting by designation pursuant to 28 U.S.C. § 294(d).

were in NSA's possession. The Agency responded that it had located foreign intelligence reports referring to appellants, but it refused to disclose them because they were all classified in their entirety. After unsuccessfully appealing through the Agency, appellants each brought suit in United States District Court to compel disclosure. Their actions were consolidated at trial and on appeal.

The Agency filed an affidavit with the district court, explaining that the located materials had been obtained through NSA's monitoring of foreign electromagnetic signals, and that disclosure of information from the materials would jeopardize this intelligence collection mission. Deeming this affidavit insufficiently detailed to satisfy the standards of *Vaughn* v. *Rosen*,[1] the district court granted appellants' motion for detailed itemization, indexing, and justification of nondisclosure.

The Agency responded to the motion with a supplemental affidavit and with a request to file classified affidavits *in camera*, claiming that further justification would require the use of evidence which was itself classified and sensitive. Upon approval from the court, NSA submitted a twenty-page affidavit, classified "Top Secret." Appellants moved for partial summary judgment and for *in camera* review of the withheld documents with participation of their counsel under protective order. The Agency moved for summary judgment on the basis of its affidavits.

The district court granted judgment for NSA on the issue of release of the documents, without viewing them *in camera*. Relying on the twenty-page *in camera* affidavit, the court found the requested documents to be within FOIA Exemptions 1 and 3. The court did, however, order the Agency to disclose the number of documents and pages being withheld; from this order the

[1] 484 F.2d 820 (1973), *cert. denied*, 415 U.S. 977 (1974).

Agency has not appealed. Appellants have now appealed the grant of summary judgment to NSA.[2]

II. Standards and Their Application

In previous cases involving FOIA requests for classified documents this court has considered what procedures are appropriate for a trial court to use, in order to determine whether documents should be released. Despite some variation in emphasis on disclosure versus secrecy, these decisions have agreed upon certain guidelines for the exercise of judicial discretion concerning such FOIA requests. Though each will be discussed in greater detail, these standards are in summary as follows. (1) The trial court must make a *de novo* review of the agency's classification decision, with the burden on the agency to justify nondisclosure.[3] (2) In conducting this review, the court is to give "substantial weight" to affidavits from the agency.[4] (3) The court is to require the agency to create as full a public record as possible, concerning the nature of the documents and the justification for nondisclosure.[5]

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[2] *See Hayden* v. *National Security Agency*, 452 F.Supp. 247 (D.D.C. 1978).

[3] *Ray* v. *Turner*, 587 F.2d 1187, 1191-94 (D.C. Cir. 1978); *Vaughn* v. *Rosen*, 484 F.2d 820, 823 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974). This is a clear statutory requirement, 5 U.S.C. § 552(a)(4)(B) (1976).

[4] *Ray* v. *Turner*, 587 F.2d at 1193-94; *Weissman* v. *Central Intelligence Agency*, 565 F.2d 692, 697 n.10 (D.C. Cir. 1977); *see* S. Rep. No. 1200, 93d Cong., 2d Sess. 12 (1974) (Conference Comm. report), *reprinted in* Senate Comm. on the Judiciary and House Comm. on Government Operations, Freedom of Information Act and Amendments of 1974 (P.L. 93-502): Source Book 229 (Comm. Print 1975) [hereinafter cited as Source Book].

[5] *Phillippi* v. *Central Intelligence Agency*, 546 F.2d 1009, 1013 (D.C. Cir. 1976); *see Vaughn* v. *Rosen*, 484 F.2d at 826-28.

(4) If step (3) does not create a sufficient basis for making a decision, the court may accept classified affidavits *in camera*,[6] or it may inspect the documents *in camera*. This step is at the court's discretion, with certain guidelines discussed below.[7] (5) The court should require release of reasonably segregable parts of documents that do not fall within FOIA exemptions.[8]

In the present case, Judge Corcoran demonstrated an understanding of these procedural standards and complied with them. We find no respect in which the court abused its discretion or made any error of law. The case does present some questions to which the answer is not perfectly obvious, however, and we will examine them in detail. These points concern facts and issues peculiar to this case, which have not been directly faced in our prior decisions, and issues on which the guidance of the earlier decisions is perhaps not entirely clear.

A. *Sufficiency of Public Record*

The limited nature of the public record in this case raises a question of its sufficiency under *Vaughn* v. *Rosen*. It is true that the public NSA affidavits do not include the itemization of documents and detailed justification of nondisclosure usually required under *Vaughn*. When the itemization and justification are themselves sensitive, however, to place them on public record could damage security in precisely the way that FOIA Exemption 1 is intended to prevent. *Vaughn* anticipated this problem by observing that the agency's analysis on the public record

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[6] *See Phillippi* v. *Central Intelligence Agency*, 546 F.2d at 1013.

[7] *See Ray* v. *Turner*, 587 F.2d at 1195; *Weissman* v. *Central Intelligence Agency*, 565 F.2d at 696-98.

[8] *Ray* v. *Turner*, 587 F.2d at 1197; *Vaughn* v. *Rosen*, 484 F.2d at 827 n.22.

ordinarily "would not have to contain factual descriptions that if made public would compromise the secret nature of the information . . . ."[9]

The facts of this case present a situation where the district court could reasonably find that public itemization and detailed justification would compromise legitimate secrecy interests, thus making it appropriate to receive affidavits *in camera* rather than in public. The unique signals intelligence mission of NSA, succinctly described in its first public affidavit, explains why secrecy concerns are greater here than is usual in FOIA cases. In most other types of cases, a public *Vaughn* itemization does not compromise secrecy, because the contents of the requested documents are not thereby disclosed, and it is only the *substantive content* which is allegedly exempt from disclosure. But with respect to NSA's signals intelligence operations, the sensitive material comprises *more* than just the substantive content of messages. Harm could follow from the disclosure of any material that might help to identify the communications intercepted by NSA, such as information about date, time, origin, or manner of transmission or receipt. Such information would be helpful for determining which channels or types of communication are being monitored by NSA. Indeed, NSA does not allege that the *substance* of the communications is sensitive, except insofar as it helps identify which communications have been of interest to NSA.

In this light, we find that the district court created "as complete a record as is possible,"[10] within the limits of possibility imposed by NSA's peculiar circumstances. We recognize that a fuller public record could enhance the

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[9] *Vaughn* v. *Rosen*, 484 F.2d at 826.

[10] *Phillippi* v. *Central Intelligence Agency*, 546 F.2d at 1013.

adversary process;[11] but it could also reveal sensitive information. This would violate Exemption 1, for its basic purpose is to ensure that the FOIA will *not* require disclosure of any such sensitive material unless judicial scrutiny finds it warranted. The proper procedure for a district court, then, is to accept sensitive affidavits *in camera*, as was done here.[12] If the material in the affidavit then appears nonsensitive, the court can order it released, as we discuss below. In a limited range of security cases, it is simply not possible to provide for orderly and responsible decisionmaking about what is to be disclosed, without some sacrifice to the pure adversary process. By providing for *in camera* review,[13] Congress has acknowledged that judges must sometimes make these decisions without full benefit of adversary comment on a complete public record. The present case is one example where some of the interests of the adversary process are outweighed by the nation's legitimate interests in secrecy and orderly process for disclosure. Especially concerning the NSA signals intelligence mission, a court cannot demand as complete a public record as in many other contexts—even other intelligence contexts[14]—without imperiling legitimate secrecy interests.

B. *Presence of Requester's Counsel at* in Camera *Review*

Appellants suggest, as a way to enhance the adversary process within an *in camera* proceeding, that their coun-

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[11] *See Vaughn* v. *Rosen*, 484 F.2d at 824-25.

[12] *See Phillippi* v. *Central Intelligence Agency*, 547 F.2d at 1013; S. Rep. No. 854, 93d Cong., 2d Sess. 15-16 (1974), *reprinted in* Source Book, *supra* note 4, at 167-68.

[13] 5 U.S.C. § 552(a)(4)(B) (1976).

[14] *Cf. Ray* v. *Turner*, 587 F.2d at 1189 & n.1 (CIA provided public identification of requested documents).

sel should have been admitted to the *in camera* review subject to a protective order. To the best of our knowledge, this privilege has never been afforded a private attorney in a national security case; on the contrary, this court has accepted the idea of *in camera* review of affidavits and documents without the presence of requester's counsel.[15] The nearest authority for the suggested procedure is language in a Senate Report encouraging it where possible in FOIA cases, and a case in this court employing it in a somewhat different context; both are cited in a recent concurring opinion in this court.[16] The Senate Report mentions approvingly a situation where an attorney was allowed access to Treasury Department files, apparently not releated to national defense, under a protective agreement.[17] The case in this court allowed access to *in camera* material for counsel to a congressional committee, expressly noting that the information was sought for legislative purposes and that counsel may be subject tc security clearance.[18] We agree that a court has inherent discretionary power to allow such access where appropriate; but it is not appropriate, and not possible without grave risk, to allow access to classified defense-related material to counsel who lack security clearance, unless a court has already determined pursuant to FOIA procedures that the material should be publicly disclosed. This court has recognized this distinction, by permitting limited access for counsel in executive privi-

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[15] *Phillippi* v. *Central Intelligence Agency*, 546 F.2d at 1011, 1013; *Vaughn* v. *Rosen*, 484 F.2d at 825.

[16] *Ray* v. *Turner*, 587 F.2d at 1212 & n.50 (Wright, C.J., concurring).

[17] S. Rep. No. 854, *supra*, note 12, at 14-15, *reprinted in* Source Book, *supra* note 4, at 166-67.

[18] *United States* v. *American Telephone & Telegraph Co.*, 567 F.2d 121, 133-34 (D.C. Cir. 1977) (supplemental opinion).

lege cases where there is no risk of damage to national security,[19] but expressly denying access when security is at stake.[20] The district court in this case, therefore, did not abuse its discretion by excluding counsel from *in camera* review of the classified affidavit.

C. *Adequacy of Grounds for Upholding Agency's Classification Decision Under Exemption 1*

We turn next to the question, whether the *in camera* affidavit and the public affidavits provided a sufficient basis for the district court, without examining the documents, to uphold the Agency's classification decision. We must first examine the standard set by Congress, and interpreted by the courts, for review of an agency's classification decision. Courts are to conduct a *de novo* review of the agency's classification decision, with the burden on the agency to show proper classification.[21] Exemptions to the FOIA are to be construed narrowly.[22] The narrow exemption in issue here applies to matters which are "(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order . . . ."[23]

If an agency demonstrates that requested materials fall within this category, then it has met its burden and

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[19] *Black* v. *Sheraton Corp.*, 564 F.2d 531, 545 (D.C. Cir. 1977); *Dellums* v. *Powell*, 561 F.2d 242, 244 (D.C. Cir.), *cert. denied*, 434 U.S. 880 (1977). *See also United States* v. *Nixon*, 418 U.S. 683, 715 n.21 (1974).

[20] *Halkin* v. *Helms*, 598 F.2d 1, 7 (D.C. Cir. 1978).

[21] 5 U.S.C. § 552(a)(3) (1976).

[22] *Phillippi* v. *Central Intelligence Agency*, 546 F.2d at 1011 n.4; *Vaughn* v. *Rosen*, 484 F.2d at 823.

[23] 5 U.S.C. § 552(b)(1) (1976).

Exemption 1 applies. The agency may meet its burden by submitting affidavits and other evidence to the court to show that the documents are properly classified and thus clearly exempt from disclosure; the court is to afford this opportunity to the agency before ordering any *in camera* inspection of documents.[24] In these affidavits, the agency has the burden under the statutory language to show (1) that it followed proper classification procedures, and (2) that by its description, the document logically falls within the claimed exemption.[25]

When the agency meets its burden by means of affidavits, *in camera* review is neither necessary nor appropriate.[26] The central issue is the standard for determining when affidavits suffice as a basis of decision without *in camera* review of the documents. As this court has expressed this standard, the affidavits must show, with reasonable specificity, why the documents fall within the exemption.[27] The affidavits will not suffice if the agency's claims are conclusory, merely reciting statutory standards, or if they are too vague or sweeping.[28] If the affidavits provide specific information sufficient to place the documents within the exemption category, if this information is not contradicted in the record, and if there

[24] *Weissman* v. *Central Intelligence Agency*, 565 F.2d at 697; *Vaughn* v. *Rosen*, 484 F.2d at 824-25; S. Rep. No. 1200, *supra* note 4, at 11, *reprinted in* Source Book, *supra* note 4, at 226.

[25] *Weissman* v. *Central Intelligence Agency*, 565 F.2d at 697.

[26] *Id.* at 696-97.

[27] *Ray* v. *Turner*, 587 F.2d at 1195.

[28] *See Founding Church of Scientology* v. *National Security Agency*, No. 76-1494, slip op. at 27 (D.C. Cir. 15 May 1979); *Goland* v. *Central Intelligence Agency*, No. 76-0166, slip op. at 21 (D.C. Cir. 23 May 1978); *Weissman* v. *Central Intelligence Agency*, 565 F.2d at 697-98.

is no evidence in the record of agency bad faith, then summary judgment is appropriate without *in camera* review of the documents.[29] The sufficiency of the affidavits is not undermined by a mere allegation of agency misrepresentation or bad faith,[30] nor by past agency misconduct in other unrelated cases. Unless the affidavits are deficient in one of the above ways, the court need inquire no further into their veracity.[31] This is in accordance with congressional intent that courts give agency affidavits "substantial weight," in recognition of the agency's expertise.[32] In this scheme, *in camera* review is a "last resort" [33] to be used only when the affidavits are insufficient for a responsible *de novo* decision.

There is a further issue of what degree of certainty the reviewing court must have, before it finds the documents to be within the exemption category. The standard for proper classification is set forth in Executive Orders 10501 and 11652. Executive Order 11652 states that documents are to be classified "Top Secret" if release of the material "could reasonably be expected to cause exceptionally grave damage to the national security," for example, by compromising "communications intelligence systems" (exactly what is involved here); and to be classified "Secret" if disclosure "could reasonably be expected to cause serious damage to the national security." [34] The standard for *de novo* review, then, even when no presump-

[29] *See, e.g., Weissman* v. *Central Intelligence Agency*, 565 F.2d at 697-98.

[30] *Ray* v. *Turner*, 587 F.2d at 1195.

[31] *See id.*

[32] S. Rep. No. 1200, *supra* note 4, at 12, *reprinted in* Source Book, *supra* note 4, at 229.

[33] *Weissman* v. *Central Intelligence Agency*, 565 F.2d at 697.

[34] Exec. O. 11652, 3 C.F.R. ch. II (1971-1975 compilation); *see* Exec. O. 10501, 3 C.F.R. ch. II (1949-1953 compilation).

tion of validity is given to the agency, must still be one of reasonable basis for finding potential harm from disclosure.

In the present case, the district court applied the precise standard of Executive Orders 10501 and 11652 and concluded that the classification procedures were proper, and that there were reasonable grounds for expecting the requisite potential harm from disclosure.[35] The Agency's public affidavits described the activity involved, the need for maintaining secrecy, and the reason for believing that disclosure of any of the requested material could compromise legitimate secrecy needs. The affidavit submitted for *in camera* review spells out these factors with greater specificity. When substantial weight is given these affidavits, under the standards we have described, summary judgment for the Agency is appropriate, without *in camera* review of the documents, unless there is a defect as described above.

Appellants attempt to show such a defect by arguing that the Agency's rationale for nondisclosure is inherently implausible.[36] They argue that some channels monitored by NSA are well known to be closely watched, and that no foreign government would send sensitive material over them; hence NSA can safely disclose material gained from those channels. This argument overlooks, first, those situations where sending sensitive material over clear, rather than encrypted channels, is the most effective means, because it is quick and simple; and, second, those situations where sensitive material might go out inadvertently over a clear channel. The Agency states that to reveal which channels it monitors would impair its mission; this is by no means an illogical or implausible

[35] *Hayden* v. *National Security Agency*, 452 F. Supp. at 251.

[36] *See, e.g.*, Reply Brief for Appellants at 6-10.

assertion; indeed, it appears inherently logical that this assertion is true, although as a court we are not called upon to make such final determination. This is precisely the sort of situation where Congress intended reviewing courts to respect the expertise of an agency;[37] for us to insist that the Agency's rationale here is implausible would be to overstep the proper limits of the judicial role in FOIA review.

D. *Segregability of Requested Materials*

This court has held that when materials exempt under the FOIA contain reasonably segregable parts that are not exempt, those parts should be disclosed;[38] the same policy applies to segregable, nonsensitive portions of a classified affidavit. We must decide whether the district court in this case erred by not ordering any portions of the documents or classified affidavit to be disclosed. Concerning the documents, NSA contended that both Exemption 1 and Exemption 3 covered each in its entirety. We find the district court's acceptance of this contention to be reasonable. The Agency's rationale for nondisclosure (of agency activities, methods, sources) applied to any and all information from the requested documents; this was not a case of exempting whole documents on a claim that they contained some exempt material. Hence there was no need for the district court to inspect the documents *in camera* for severable portions.[39]

Concerning the classified NSA affidavit, it is true that in a similar FOIA case against NSA, another district

[37] *See* S. Rep. No. 1200, supra note 4, at 12, *reprinted in* Source Book, *supra* note 4, at 229.

[38] *See Ray* v. *Turner*, 587 F.2d at 1196-97; *Vaughn* v. *Rosen*, 484 F.2d at 827-28.

[39] *See Weissman* v. *Central Intelligence Agency*, 565 F.2d at 698.

court has released some paragraphs from a similar NSA affidavit.[40] We do not express an opinion on that court's exercise of discretion, but we find in the present case that the district court had reasonable grounds for its action. After reading the classified affidavit, we find, under the statutory standard, that it was reasonable, in the interests of national security, to conclude that the information was sensitive and properly classified. The selection of the portions furnished plaintiffs' counsel and those retained in Top Secret status was entirely justified; indeed, the preservation of secrecy in regard to those matters not disclosed appears to us to be imperative in the interests of national security. The court's use of its discretion is further supported by the congressional determination, reflected in Public Law No. 86-36,[41] that disclosure of NSA's activities is not to be required by law due to the potential harm to security.

Those parts which repeated the Agency's public description of its signals intelligence mission may perhaps not have been sensitive; but to release them would have merely duplicated material already in the public record. Shortly before appellate argument in this case, the government released to appellant's counsel several paragraphs of the classified affidavit. These paragraphs substantially duplicated those which were released in the other FOIA case against NSA, after the time of the district court decision in the present case. It was reasonable for the government to release these paragraphs after their substance had been publicly compromised, even though the district court had earlier found them properly classified.

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[40] *Baez* v. *National Security Agency*, No. 76-1921 (D.D.C. 2 Nov. 1978).

[41] Discussed in Part III below.

III. Exemption 3

As an alternative ground, the district court rested on FOIA Exemption 3.[42] That provision of the FOIA exempts from disclosure those matters which are

> specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld . . . .

The district court found Public Law No. 86-36 to be such an exempting statute.[43] Section 6(a) of that law states:

> Except as provided in subsection (b) of this section, nothing in this Act or any other law (including, but not limited to, the . . . [Classification Act of 1949]) shall be construed to require the disclosure of the organization or *any function* of the National Security Agency, of *any information with respect to the activities thereof*, or of the names, titles, salaries, or number of the persons employed by such agency.[44]

Public Law No. 86-36 clearly refers to particular types of matters to be withheld, as required by Exemption 3, and this court has already held it to be an Ex-

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[42] 5 U.S.C. § 552(b)(3) (1976).

[43] *Hayden* v. *National Security Agency*, 452 F. Supp. at 252.

[44] Pub. L. No. 86-36, 73 Stat. 63 (1959) (codified at 50 U.S.C. § 402 (1976)) (emphasis added). The Classification Act of 1949, 5 U.S.C. § 654 (1958), was repealed by Pub. L. No. 86-626, 74 Stat. 472 (1960). As exempting statutes NSA also points to 50 U.S.C. § 403(d)(3) and 18 U.S.C. § 798. The district court rested only on Pub. L. No. 86-36, which grants the broadest exemption of the three statutes; therefore it is the only exempting statute which we will consider here.

emption 3 statute in *Founding Church of Scientology* v. *National Security Agency*.[45] In that case we left open one question which is important here: the proper scope to be given the exemption under Public Law No. 86-36.[46] On this issue we find the plain wording of the statute conclusive in the present case. The public record in this case, even without the *in camera* affidavit, demonstrates that release of the documents would disclose a function of the NSA, since signals intelligence is one of the Agency's primary functions; and would disclose information with respect to Agency activities, since any information about an intercepted communication concerns an NSA activity. Certainly where the function or activity is authorized by statute and not otherwise unlawful, NSA materials integrally related to that function or activity fall within Public Law No. 86-36 and Exemption 3.

Appellants argue that Public Law No. 86-36 should be applied for Exemption 3 purposes in the same manner as similar statutes which concern the Central Intelligence Agency (CIA). This court has, on occasion, interpreted the CIA's Exemption 3 statute[47] narrowly, so as to make it in effect no broader than Exemption 1.[48] But the statutes regarding the CIA exempt only "intelligence sources and methods"[49] and the "organization, functions, names, official titles, salaries, or numbers of

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[45] No. 76-1494 (D.C. Cir. 15 May 1979).

[46] *Id.*, slip op. at 11 n.46.

[47] 50 U.S.C. §§ 403(d)(3), 403g (1976).

[48] *Phillippi* v. *Central Intelligence Agency*, 546 F.2d 1009, 1015-16 n.14 (1976); *see Ray* v. *Turner*, 587 F.2d at 1196. *But see Baker* v. *Central Intelligence Agency*, 580 F.2d 664, 668-69 (1978) (holding that exemption under § 403g extends beyond intelligence matters with security nexus).

[49] 50 U.S.C. § 403(d)(3) (1976).

personnel employed by the Agency."[50] Public Law No. 86-36, on the other hand, protects not only organizational matters of this sort, but also "any information with respect to the activities" of the NSA. Any difference in FOIA Exemption 3 treatment of the CIA and NSA results necessarily from this difference in their respective exemption statutes. Nowhere in the legislative history of Public Law No. 86-36 does Congress express any intent to limit the effect of the clear statutory language. The Senate Report stated that the statute was consistent with legislation for other similarly secretive defense agencies,[51] but it neither stated nor implied that it was identical in its exact scope of protection.[52] Indeed, the House and Senate Reports both show that Congress was fully aware of the "unique and sensitive activities of the Agency," which require "extreme security measures."[53] In light of the peculiar NSA security needs already discussed in this case, Congress certainly had rational grounds to enact for the NSA a protective statute broader than the CIA's. While we note that one district court has narrowed the NSA's exemption under Public Law No. 86-36 to the same gauge as the CIA's,[54] we can find no basis in law for doing so.

The factual showing required here for NSA to satisfy Exemption 3 is by nature less than for Exemption 1. In its affidavits, the Agency must show specifically and clearly that the requested materials fall into the cate-

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[50] 50 U.S.C. § 403g (1976).

[51] S. Rep. No. 284, 86th Cong., 1st Sess. 2 (1959).

[52] *See also* H.R. Rep. No. 231, 86th Cong., 1st Sess. (1959).

[53] *Id.* at 6; S. Rep. No. 284, *supra* note 51, at 3 (letter from Office of Secretary of Defense to President of the Senate and Speaker of the House).

[54] *Baez* v. *National Security Agency*, No. 76-1921, memo. and order at 9-11 (D.D.C. 7 April 1978).

gory of the exemption. Here the Agency stated in its affidavits that all requested documents concerned a specific NSA activity, to wit, intelligence reporting based on electromagnetic signals. These affidavits further explained how disclosure even of descriptions and dates of the material would reveal information integrally related to this NSA activity. This is all that is necessary for the Agency to meet its burden under Public Law No. 86-36 and Exemption 3. A specific showing of potential harm to national security, while necessary for Exemption 1, is irrelevant to the language of Public Law No. 86-36. Congress has already, in enacting the statute, decided that disclosure of NSA activities is potentially harmful.

The proper standard for satisfying Exemption 3 is illustrated by a comparison with our decision in *Founding Church of Scientology*,[55] which reversed a district court grant of summary judgment for NSA. In that case the Agency submitted a conclusory affidavit, with no more specifics than that the requested material was obtained through "lawful signals intelligence activities," and that disclosure would "reveal certain functions and activities of the NSA . . . ." [56] In the present case, on the other hand, NSA has described the intelligence activity involved, and has shown why disclosure of requested materials could reveal the nature of that activity. Further detail about specific documents would not be relevant to this exemption; Exemption 3 differs from Exemption 1 in that "its applicability depends less on the detailed factual contents of specific documents . . . ." [57] The

[55] *Founding Church of Scientology* v. *National Security Agency*, No. 76-1494 (D.C. Cir. 15 May 1979).

[56] *Id.*, slip op. at 14-16.

[57] *Goland* v. *Central Intelligence Agency*, No. 76-0166, slip op. at 20 (D.C. Cir. 23 May 1978).

Agency stated as much detail publicly in this case as it reasonably could without revealing sensitive information,[58] and presented further specifics *in camera*. This is the proper way to satisfy FOIA Exemption 3.

The grant of summary judgment by the district court is therefore

Affirmed.

[58] *See Founding Church of Scientology* v. *National Security Agency*, slip op. at 19 n.72.

UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

No. 78-1728 September Term, 1979

Thomas E. Hayden, Appellant
v.
National Security Agency/ Central Security Service, et al.

Filed Jan 9 1980
George A. Fisher
Clerk

And Consolidated Case No. 78-1729

BEFORE: MacKinnon and Wilkey, Circuit Judges; and Gordon*, Senior Judge, United States District Court for the Western District of Kentucky

O R D E R

Upon consideration of appellants' (Hayden, et al.) petition for rehearing, it is

ORDERED, by the Court, that appellants' aforesaid petition for rehearing is denied.

Per Curiam

FOR THE COURT:

GEORGE A. FISHER
Clerk

*Sitting by designation pursuant to Title 28 U.S.C. §294(d).

UNITED STATES COURT OF APPEALS FOR THE
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Filed Jan 9, 1980
George A. Fisher
Clerk

And Consolidated Case No. 78-1729

BEFORE: Wright, Chief Judge, McGowan, Tamm, Robinson, MacKinnon, Robb, Wilkey, Wald, and Mikva, Circuit Judges

O R D E R

The suggestion for rehearing en banc filed by appellants (Hayden, et al.) having been transmitted to the full Court and a majority of the judges in regular active service not having voted in favor thereof, it is

ORDERED, by the Court, that appellants' aforesaid suggestion for rehearing en banc is denied.

Per Curiam

FOR THE COURT:

GEORGE A. FISHER
Clerk

Chief Judge Wright and Circuit Judges Robinson, Wald, and Mikva would grant the suggestion for rehearing en banc.

UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

No. 78-1728 September Term, 1979

Thomas E. Hayden, Appellant
Filed Jan 30, 1980
George A. Fisher
Clerk

v.

National Security Agency/
Central Security Service,
et al.

And Consolidated Case No. 78-1729

BEFORE: MacKinnon and Wilkey, Circuit Judges; and Gordon*, Senior Judge, United States District Court for the Western District of Kentucky

O R D E R

Upon consideration of appellants' (Hayden, et al.) motion for stay of mandate, and no opposition having been filed thereto, it is

ORDERED, by the Court, that appellants' aforesaid motion is granted and the Clerk is directed not to issue the mandate in the instant cases prior to February 28, 1980.

Per Curiam

FOR THE COURT:

GEORGE A. FISHER
Clerk

*Sitting by designation pursuant to Title 28 U.S.C. §294(d).

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THOMAS E. HAYDEN

and

JANE S. FONDA,

Plaintiffs,

v.

NATIONAL SECURITY AGENCY, et al.,

Defendants.

Civil Action Nos. 76-286 and 76-287 (Consolidated)

MEMORANDUM AND ORDER

I. Introduction

Plaintiffs bring this consolidated action1/ pursuant to the Freedom of Information Act (FOIA) 5 U.S.C. §552 et seq., seeking disclosure of all records pertaining to them in possession of the National Security Agency (NSA). Defendants have filed a Motion for Summary Judgment2/ alleging that the information is exempt from

1/ C.A. 76-0286 and C.A. 76-0287.

2/ Subsequent to the filing of its motion defendants have filed two Reply Memoranda.

disclosure under 5 U.S.C. §552(b)(1) and 5 U.S.C. §552(b)(3). Plaintiffs have filed a Cross-Motion for Partial Summary Judgment and In Camera Review Subject to Protective Order.3/

II. Background

Following exhaustion of their administrative remedies, plaintiffs filed actions on February 20, 1976. A motion to consolidate was granted May 11, 1976.

Thereafter, plaintiffs filed a Vaughn4/ motion seeking a more detailed justification, itemization and indexing of the documents sought to be withheld. Defendants responded with an affidavit from Norman Boardman, Information Officer of defendant NSA. Finding this affidavit insufficient under Vaughn, we granted plaintiffs' Vaughn motion on January 12, 1977.

3/ Subsequent to the filing of its motion, plaintiffs have filed two Supplemental Memoranda.

4/ See Vaughn v. Rosen, 157 U.S. App. D.C. 340, 484 F.2d 820, 826-828 (1973).

Defendants then responded with their Motion for Summary Judgment and an alternative Motion for Leave to Submit Classified Affidavits for in camera examination. In support of the motions defendants submitted a second Boardman affidavit as well as an affidavit by Charles A. Briggs, Chief of the Information Service Staff of the Central Intelligence Agency (CIA).

Plaintiffs opposed both of defendants' motions and filed a Cross-Motion for Partial Summary Judgment and a Motion for in camera review of the documents with plaintiffs' counsel present.

On April 18, 1977, we granted defendants' Motion for Leave to Submit Classified Affidavits for in camera examination, whereupon defendants submitted a third Boardman affidavit in camera. It is twenty pages in length and is classified "Top Secret."

Neither this last "Top Secret" Boardman affidavit nor defendants' pleadings contend that any of the documents are exempt from disclosure because of the substantive information which they contain. Rather, it is defendants' contention that the documents at issue are exempt under 5 U.S.C. §552(b)(1) and (b)(3) because disclosure would reveal the means by which the information was acquired, thereby revealing intelligence sources and methods, and the manner in which NSA functions.

We turn our attention to these contentions.

III. Exemption Under 5 U.S.C. §552(b)(1)

Exemption (b)(1) exempts from the disclosure obligations of the FOIA matters that are:

> (b)(1)(A) specifically authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy and (B) are in

(Continued. . .)

(Continued. . .)

> fact properly classified pursuant to such Executive Order.

Defendants assert that Executive Orders (EO) 10501[5] and 11652[6] specifically authorize them to withhold the requested documents and that such documents have been properly classified as either "Top Secret"[7] or "Secret"[8] pursuant to the

5/ 3 CFR 1949-1953 Compilation (Nov. 4, 1953) at 979. The relevant portions of this EO largely parallel those of EO 11652.

6/ 3 CFR 1971-1975 Compilations (March 8, 1972) at 678.

7/ EO 11652 §1(A) authorizes "Top Secret" classification to documents whose disclosure could reasonably be expected to cause "exceptionally grave damage to the national security" by inter alia compromising "cryptologic and communications intelligence systems" or by revealing "sensitive intelligence operations; and the disclosure of scientific or technological developments vital to national security."

8/ EO 11652 §1(B) authorizes "Secret" classification to documents whose disclosure could reasonably be expected to cause "serious damage to the national security" by inter alia disrupting "foreign relations significantly affecting the national se-

(Continued. . .)

Executive Orders. Plaintiffs urge that to determine if the documents meet the criteria established in EO 11652 and whether they have been properly classified this Court should conduct an in camera inspection of the documents with counsel present.

A. In Camera Inspection

The necessity for in camera inspection was left to the discretion of the Court by Weissman v. CIA, ___U.S. App. D.C. ___, 565 F.2d 692, 696 (1977); and before the Court orders such inspection, "the Government should be given the opportunity to establish by means of testimony or detailed affidavits that the documents are clearly exempt from disclosure." Id. at 697. "It is only where the record is vague or the agency claims too sweeping or suggestive of

8/ (Continued. . .)
curity," by significantly imparing [sic] "a program or policy directly related to the national security," or by revealing significant "intelligence operations."

bad faith that a District Court should conduct an in camera examination to look for segregable non-exempt matter." Id. at 698.

It was precisely because we found the record too vague and the agency claims too sweeping that we granted defendants' motion to submit a more detailed in camera affidavit. The twenty-page Boardman in camera affidavit which defendants most lately filed contains a summary of each document sought to be withheld, accompanied by a detailed explanation of intelligence sources, methods, or NSA modus operandi by which it was secured. The affidavit also lists the specific exemptions upon which defendants rely for each document. We view the contents of this affidavit to have remedied the vagueness and overbreadth of defendants' prior affidavits and, finding no suggestion of bad faith,9/ we conclude that an in

9/ Plaintiffs suggest that past abuses by defendants provides "evidence of possible bad faith." However, as plaintiffs amply
(Continued. . .)

camera submission of the documents themselves is unnecessary.

B. Agency Prerequisites for Asserting Exemption (b)(1)

In Weissman, supra 565 F.2d at 679 (as amended by the Court's Order of April 4, 1977), the Court established a bifurcated analysis which must be undertaken with respect to exemptions claimed under §552(b)(1):

> If exemption is claimed on the basis of national security the District Court must, of course, be satisfied that the proper procedures have been followed, and that by its sufficient description the contested document logically falls into the exemption indicated.

9/ (Continued. . .)
demonstrate in their Memorandum in opposition to Defendants' Motion for Summary Judgment . . . at 7-8, N.6 & 21-22 & N.13, these abuses have been fully investigated and exposed. We do not deem these recountings of past abuses as sufficient to support plaintiffs' allegations of defendants' possible bad faith in their processing of current FOIA requests.

Accordingly, we move to consider whether the documents have been properly classified under EO 11652, and whether the affidavits submitted by defendants have established that the documents logically fall within the (b)(1) exemption.

(i) Document Classification

On this score, defendants have submitted an affidavit indicating: (1) that each portion of each document is classified Secret or Top Secret pursuant to Executive Orders 10501 and 11652;10/ (2) that each document has been reviewed by a duly authorized classification officer11/ and; (3) that each document has the appropriate classification markings.12/ We deem this affidavit as satisfying defendants" burden of demonstrating that the appropriate

10/ See Boardman affidavit filed with Defendants Motion for Summary Judgment at par. 3a.

11/ Id. at par. 3a-6.

12/ Id. at par. 3c.

procedural steps were taken in classifying the documents. Klaus v. Blake, 428 F. Supp. 37, 38 (D.D.C. 1976).

(ii) Document Content

The defendants assert that the contents of the documents fall within the (b)(1) exemption which permits withholding of information which would compromise national defense or foreign policy of the United States. They place particular reliance on the Top Secret Boardman in camera affidavit. In evaluating this affidavit, we note that:

> the legislative history of the 1974 amendments [to the (b)(1) exemption] makes clear that . . . 'substantial weight' is to be accorded to detailed agency affidavits setting forth the basis for exemption.
>
> The conferees recognize that the Executive departments responsible for national defense and foreign policy matters have unique insights into what adverse effects might occur as a result of public disclosure of a particular classified record.

(Continued. . .)

(Continued. . .)

> Accordingly the conferees except [sic] that the federal courts, in making de novo determinations in section 552(b)(1) cases under the Freedom of Information Act, will accord substantial weight to an agency's affidavit concerning the details of the classified status of the disputed record. S. Rep. 93-1200, 93d Cong., 2d Sess. 12 (1974). Weissman, supra, at 697 n. 10 (as amended).

It would logically follow from this directive to accord "substantial weight" to an agency determination as to the classification of documents that we should give no less weight to an agency's stated reasons for refusal to release the contents of those documents, particularly when those stated reasons represent the conclusions of those who daily deal with the securing and evaluation of foreign intelligence and whose training and experience and intuition are focused upon and directed to those functions. Reading the Top Secret Boardman

in camera affidavit in that light, we are satisfied that the release of the material either "could reasonably be expected to cause exceptionally grave danger to the national security[sic]13/ or "could reasonably be expected to cause serious damage to the national security"14/ by revealing intelligence sources or methods or by revealing functions and activities of the NSA. Accordingly we hold that 5 U.S.C. §552(b)(1) exempts from disclosure the documents sought by the plaintiff in this action.

III. Exemption Under 5 U.S.C. §552(b)(3)

As an alternative basis for withholding the requested documents, defendants assert that the documents are exempt under 5 U.S.C. §552(b)(3). This exemption provides for nondisclosure of matters that

13/ EO 11652, §1(A).

14/ Id. at §1(B).

are "specifically exempted from disclosure by statute." Defendants assert inter alia that Pub. L. No. 86-36, §6, 73 Stat 63 (50 U.S.C.A. §402 note)(1959) is such an exemption 3 statute and that the documents sought by plaintiffs fall within its purview. That section reads as follows:

> Nothing in this act or any other law (including but not limited to, the first section and section 2 of the Act of August 28, 1935 5 U.S.C. §654) shall be construed to require the disclosure of the organization or any function of the National Security Agency, or any information with respect to the activities thereof, or of the names, titles, salaries or numbers of persons employed by such agency. (emphasis supplied).

Defendants contend that the release of the documents sought by plaintiffs would result in the disclosure of the organization, functions and activities of NSA. On the other hand, plaintiffs assert that Pub. L. No.s 86-36 is not an exemption 3 statute and, alternatively, that if it is, it should

be interpreted as having "the limited purpose of implementing any protection of intelligence sources or methods under exemption (b)(1) and Executive Order No. 11652."15/ The Courts have uniformly rejected plaintiffs first assertion.16/ As to the alternative, it is true that one court has interpreted Pub. L. No. 86-36 to be limited in its scope17/. But even if we were to accept this "limited scope" interpretation, we view the in camera Boardman affidavit as having established that withholding of the documents is necessary for the protection of intelligence sources, methods and

15/ Plaintiffs' Memorandum in Opposition to Defendants' Motion for Summary Judgment at 26.

16/ Baez v. NSA, C.A. 76-1921 (D.D.C., April 6, 1978) at 9; Church of Scientology v. NSA, C.A. 76-1494 (D.D.C. July 21, 1977) at 2; Kruh v. GSA, 421 F. Supp. 965 (E.D.N.Y. 1976).

17/ Baez, supra at 9-11. In Baez, the Court did not have, as we do, an in camera affidavit dealing with the activity of the NSA. In making its determination that Pub. L. 86-36 provides only a limited exemption, the

(Continued. . .)

activities. Accordingly, we would hold that the documents would be exempt from disclosure even under plaintiff's "limited scope" interpretation of Pub. L. No. 86-36.

17/ (Continued. . .)
Court found similarities between the language, purpose and history of that statute and those of 50 U.S.C. §403(g) which was the subject of analysis in Phillippi v. CIA, ___U.S. App. D.C.___, 546 F.2d 1009 (1976). Section 403(g) provides, in relevant part that

> . . . in order to further implement the proviso of section 403 (d)(3) of this title that the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure, the agency shall be exempted from . . . the provisions of any other law which require the publication or disclosure of the organization, functions, names, official titles, salaries or numbers of personnel employed by the agency. (emphasis supplied)

The Phillippi Court held that §§403 (d)(3) and 403(g) do not provide the CIA with complete exemption from disclosure of its records under the FOIA. The Court in Baez similarly held that Pub. L. No. 86-36 does not provide the NSA with a blanket exemption. However Baez left unclear what it envisioned the scope of Pub. L. No. 86-36 to be. At one point it seems to suggest, that the statute only authorizes withholding of information which the NSA could

(Continued. . .)

IV. Conclusion

In view of the foregoing, we grant defendants' Motion for Summary Judgment on the issue of the release of the documents themselves.

17/ (Continued. . .) "demonstrate . . . can reasonably be expected to lead to unauthorized disclosure of intelligence sources and methods . . . ." Baez, supra at 10. However the Court later speaks of NSA's burden of showing that the documents withheld would, in fact, disclose the organization, function, activities or personnel structure of the agency." Id. at 11. We note in passing our view that the language of Pub. L. No. 86-36 supports this latter interpretation. Unlike §403(g) which speaks in terms of exempting information which would reveal "the organization [and] functions . . . of personnel employed by the [CIA]," Pub. L. No. 86-36 exempts information which would reveal "the organization of any function of the NSA, or any information with respect to the activities thereof . . . ." (emphasis supplied). Accordingly, though Pub. L. No. 86-36 may not provide a blanket exemption for the NSA, the scope of the exemption it does provide would appear to be considerably broader than that provided the CIA under §403(g) which the Court in Phillippi, supra 546 F.2d at 1015 n.14 described as including any "information about its internal structure."

However, plaintiffs have also expressed an interest in the number of documents being withheld and the number of pages included in each document in that "it might suggest the scope of the NSA's interceptions of communications by, to or concerning a political dissident, an issue of vast public interest in a democracy . . . ."18/

We fail to see how the revelation of this information could result in disclosing intelligence methods or sources of [sic] NSA functions and activities. Accordingly, defendants are ORDERED within 20 days of the filing date of this Memorandum and Order, to disclose to plaintiffs the number of documents being retained and relating to each of them and the number of pages included in each document.

18/ Plaintiffs' Memorandum in Opposition to Defendants' Motion for Summary Judgment . . . at 12.

In all other respect, plaintiffs' Cross Motion for Partial Summary Judgment and In Camera Review Subject to Protective Order should be, and the same hereby is denied.19/

It is so ORDERED this 27th day of April, 1978.

HOWARD F. CORCORAN
JUDGE

19/ Our holding herein necessarily renders ineffective our previous grant of a Vaughn motion, supra at p.2.

FREEDOM OF INFORMATION ACT
(Relevant Portions)

The Freedom of Information Act, 5 U.S.C. § 552, as amended, Pub. L. No. 93-502, 88 Stat. 1561 (Nov. 21, 1974), in pertinent part provides:

> § 552(a)(4)(B) On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action.
>
> * * *
>
> § 552(a)(4)(E) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.
>
> * * *

§ 552(a)(6)(A) Each agency, upon any request for records made under paragraph (1), (2), or (3) of this subsection, shall --

(i) determine within ten days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of such determination and the reasons therefor, and of the right of such person to appeal to the head of the agency any adverse determination; and

(ii) make a determination with respect to any appeal within twenty days (excepting Saturdays, Sundays, and legal public holidays) after the receipt of such appeal. If on appeal the denial of the request for records is in whole or in part upheld, the agency shall notify the person making such request of the provisions for judicial review of that determination under paragraph (4) of this subsection.

* * *

§ 552(a)(6)(C) Any person making a request to any agency for records under paragraph (1), (2), or (3) of this subsection shall be deemed to have exhausted his administrative remedies with respect to such request if the agency fails to comply with the applicable time limit provisions of this paragraph. If the Government can show exceptional circumstances exist and that the agency is exercising due diligence in responding to the request, the court may retain jurisdiction and allow the agency additional time to complete its review of the rec-

ords. Upon any determination by an agency to comply with a request for records, the records shall be made promptly available to such person making such request. Any notification of denial of any request for records under this subsection shall set forth the names and titles or positions of each person responsible for the denial of such request.

§ 552(b) This section does not apply to matters that are --

(1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

(3) specifically exempted from disclosure by statute (other than section 552(b) of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld; any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection.

PUBLIC LAW NO. 86-36,§6, . reprinted at Note to 50 U.S.C. §402 (1976 ed.)

Sec. 6(a) Except as provided in subsection (b) of this section, nothing in this Act or any other law (including, but not limited to, the first section and section 2 of the Act of August 28, 1935 (5 U.S.C. 654) [repealed by Pub. L. 86-626, title I,§101, July 12, 1960, 74 Stat. 427]) shall be construed to required the disclosure of the organization or any function of the National Security Agency, or any information with respect to the activities thereof, or of the names, titles, salaries, or number of the persons employed by such agency.

(b) The reporting requirements of section 1582 of title 10, United States Code, shall apply to positions established in the National Security Agency in the manner provided by section 4 of this Act.

Rule 54(e), Federal Rule of Civil Procedure

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Relevant Portions of Executive Order 11652

Section 1...
(A) "Top Secret". "Top Secret" refers to that national security information or material which requires the highest degree of protection. The test for assigning "Top Secret" classification shall be whether its unauthorized disclosure could reasonably be expected to cause exceptionally grave damage to the national security. Examples. . . include . . . the compromise of vital national defense plans or complex cryptologic and communications intelligence systems; the revelation of sensitive intelligence operations; and the disclosure of scientific or technological developments vital to national security. This classification shall be used with the utmost restraint.

(B)"Secret". "Secret" refers to that national security information or material which requires a substantial degree of protection. The test for assigning "Secret" classification shall be whether its unauthorized disclosure could reasonably be expected to cause serious damage to the national security. Examples . . . include . . . significant impairment of a program or policy directly related to the national security; revelation of significant military plans or intelligence operations; and compromise of significant scientific or technological developments relating to national security. The classification "Secret" shall be sparingly used.

Relevant portions of Executive Order 12065

...
1-102. "Top Secret" shall be applied only to information, the unauthorized disclosure of which reasonably could be expected to cause exceptionally grave damage to the national security.

1-103. "Secret" shall be applied only to information, the unauthorized disclosure of which reasonably could be expected to cause serious damage to the national security.

Supreme Court, U.S.
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No. 79-1334

In the Supreme Court of the United States

OCTOBER TERM, 1979

THOMAS E. HAYDEN AND JANE S. FONDA, PETITIONERS

v.

NATIONAL SECURITY AGENCY/CENTRAL SECURITY SERVICE, ET AL.

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 608 F. 2d 1381. The opinion of the district court (Pet. App. 23a-40a) is reported at 452 F. Supp. 247.

JURISDICTION

The judgment of the court of appeals was entered on October 29, 1979. A petition for rehearing was denied on January 9, 1980 (Pet. App. 20a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals correctly sustained the National Security Agency's claim of exemption for classified information sought to be disclosed under the Freedom of Information Act.

STATEMENT

Pursuant to the Freedom of Information Act (FOIA), petitioners sought release by the National Security Agency (NSA) of all information pertaining to them. NSA acknowledged that it had classified foreign intelligence reports which made reference to petitioners, but it declined to release them on the ground that they were properly classified under Exec. Order No. 11652, 3 C.F.R. 678 (1971-1975 Compilation),[1] and were therefore exempt under Exemption 1 of the FOIA, 5 U.S.C. 552(b)(1).[2] In addition, NSA claimed that the material was covered by Exemption 3 of the FOIA, 5 U.S.C. 552(b)(3),[3] which allows the withholding of matters that are specifically exempted from disclosure under other statutes. NSA relied on three such statutes: 50 U.S.C. 403(d)(3), 18 U.S.C. 798, and Pub. L. No. 86-36, Section 6, 73 Stat. 64.[4] Following unsuccessful administrative appeals,

[1]Exec. Order No. 11652 was superseded by Exec. Order No. 12065, 3 C.F.R. 190 (1978 Compilation), effective December 1, 1978. The new Executive Order made no changes in the classification categories involved here, "Secret" and "Top Secret."

[2]5 U.S.C. 552(b)(1) exempts from the FOIA's disclosure provisions "matters that are (A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order; * * *."

[3]5 U.S.C. 552(b)(3) provides that the disclosure provisions of the FOIA do not apply to matters that are "specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld; * * *."

[4]Section 6(a) of Pub. L. No. 86-36, 73 Stat. 64, provides: "Except as provided in subsection (b) of this section, nothing in this Act or any other law (including, but not limited to, the first section and section 2 of the Act of August 28, 1935 (5 U.S.C. 654)) shall be construed to require the disclosure of the organization or any

petitioners filed suit in the United States District Court for the District of Columbia seeking disclosure of all or segregable non-exempt portions of the materials in question.

The district court found NSA's public affidavits in support of withholding insufficiently detailed to sustain the agency's action, but the court subsequently accepted, in camera, a 20-page "Top Secret" affidavit explaining the basis for the agency's withholding of the information. On the basis of that affidavit, coupled with the public record, the district court sustained NSA's Exemption 1 claim. NSA did not assert, and the district court did not hold, that the material was exempt from disclosure because of the substantive information it contained (Pet. App. 26a). Instead, in concluding that the documents were properly classified in their entirety, the district court found that "disclosure would reveal the means by which the information was acquired, thereby revealing intelligence sources and methods, and the manner in which NSA functions" (*ibid.*). As an alternative basis for withholding, the court upheld NSA's Exemption 3 claim based on Section 6 of Pub. L. No. 86-36, 73 Stat. 64, finding that

function of the National Security Agency, of any information with respect to the activities thereof, or of the names, titles, salaries, or number of the persons employed by such agency." The exception in subsection (b) pertains to certain reports submitted to Congress pursuant to 10 U.S.C. 1582 and therefore has no bearing on this case.

In light of their construction of Pub. L. No. 86-36, 73 Stat. 63, the courts below did not consider the applicability of 50 U.S.C. 403(d)(3) and 18 U.S.C. 798 (see Pet. App. 15a n.44). The former provides that the Director of Central Intelligence shall be responsible "for protecting intelligence sources and methods from unauthorized disclosure," and the latter provides criminal penalties for the unauthorized release or use of classified information relating to communication intelligence activities.

withholding was necessary to protect intelligence sources, methods, and activities and "information with respect to the activities" of NSA under that provision (Pet. App. 34a-37a).

The court of appeals affirmed in a comprehensive decision (Pet. App. 1a-19a). After analyzing the appropriate guidelines and standards for judicial review, the court held that the district court had developed the most complete public record possible given NSA's "peculiar circumstances" (Pet. App. 6a). In the court's view, public disclosure of any meaningful substantive information might enable an informed person to "identify the communications intercepted by NSA, such as information about date, time, origin, or manner of transmission or receipt" and thus to discern "which channels or types of communication are being monitored by NSA" (*ibid.*). With respect to Exemption 1, based on the public and in camera record, the court of appeals held that NSA had met its burden of showing that it had followed proper classification procedures and that, by the agency's description of the requested information, the material "logically falls" within the claimed exemption (Pet. App. 10a, citing *Weissman* v. *CIA*, 565 F. 2d 692, 697 (D.C. Cir. 1977)). In determining the sufficiency of the agency's description of the material and the basis for withholding it, the court recognized Congress' intent that courts accord "substantial weight" to the agency's affidavits justifying withholding (Pet. App. 4a, 11a, quoting S. Conf. Rep. No. 93-1200, 93d Cong., 2d Sess. 12 (1974)).

The court of appeals also sustained NSA's independent basis for withholding the requested material under Exemption 3 of the FOIA and Section 6 of Pub. L. No. 86-36, 73 Stat. 64. The court found (Pet. App. 15a) that Section 6 satisfies the requirements of an Exemption 3

statute, because it clearly "refers to particular types of matters to be withheld" within the meaning of Exemption 3—*i.e.*, "the organization or any function of the National Security Agency, * * * any information with respect to the activities thereof, or * * * the names, titles, salaries, or number of the persons employed by such agency." The court remarked that "[t]he public record in this case, even without the *in camera* affidavit, demonstrates that release of the documents would disclose a function of the NSA, since signals intelligence is one of the Agency's primary functions; and would disclose information with respect to Agency activities, since any information about an intercepted communication concerns an NSA activity" (Pet. App. 16a). Accordingly, the court held that NSA had satisfied its burden under Exemption 3 by describing the "intelligence activity involved and why disclosure of the requested materials could reveal the nature of that activity" (*id.* at 18a).

ARGUMENT

The judgment of the court of appeals may be sustained on the basis of either its Exemption 1 or its Exemption 3 holding. But the court of appeals' decision is clearly correct as to both alternatives, and there is no conflict among the circuits. Accordingly, further review is unwarranted.

1. *Exemption 1*

(a) In challenging the court of appeals' conclusion that the materials were properly classified, petitioners err in focusing on the non-sensitive *content* of these documents (Pet. 13). Both courts below correctly recognized that

classification here is necessary, not to protect content, but to protect intelligence sources and methods.[5]

NSA supplies intelligence information to policy makers at the highest levels of government, pursuant to requirements of the intelligence community. The fact that particular channels were surveilled by NSA at a particular time reflects the specific concerns of government policy makers. Identifying sources and methods pertaining to particular information, therefore, might well affect the government's ability to conduct effective foreign policy. In addition, knowledge of the types and channels of communication of interest to our government would permit targets of NSA surveillance to thwart the NSA's ability to gather intelligence information. The courts below properly held that the damage to national security and foreign relations that could reasonably be caused by

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[5]Contrary to petitioners' representations (Pet. 2, 9, 13), NSA has never publicly conceded that the communications at issue were sent without encryption or other protection or were transmitted over commercial communications networks. While the content is classified only to protect intelligence sources and methods, it is not possible to describe the communications or to summarize or excerpt their contents understandably without identifying the particular communications.

Petitioners apparently rely on a statement in the government's brief in the court of appeals (Br. 16) that "[f]oreign targets do not generally act on the assumption that their communications are being intercepted, even when transmitted in unencrypted form over international commercial carriers." The brief further notes (*ibid.*) that foreign targets "are observed generally to be acting on the apparent assumption that their communications are not intercepted, probably because they are aware of the disproportion between the total volume of communications and NSA's limited ability to deal with them." These general statements obviously do not concede that the particular communications involved in this case were sent in unencrypted form over commercial networks.

the disclosure that particular communications had been monitored fully justified the classification of the reported information, without regard to the sensitivity of the information itself (Pet. App. 12a, 26a).

(b) Petitioners' reliance on public sources purporting to reveal some of NSA's intercept capabilities (Pet. 16-17) is equally misplaced. First, there is no basis in the record for judging the accuracy of what may be nothing more than speculation as to NSA's activities and capabilities. Second, even if it is assumed that the public is aware of NSA's capabilities in some respects and that those capabilities have some relation to the communications at issue here (but see note 5, *supra*), this would in no way diminish the harm that would flow from revelation that a specific communications circuit was of interest to NSA at a particular point in time.

(c) Petitioners are incorrect in their assertion (Pet. 17) that the court of appeals employed an erroneous standard of review. The court's opinion expressly acknowledges that judicial review under the FOIA is de novo and that the reviewing court must be satisfied that the document, by its sufficient description, "logically falls within the claimed exemption" (Pet. App. 10a; see *Weissman* v. *CIA*, 565 F. 2d 692, 697 (D.C. Cir. 1977); *Ray* v. *Turner*, 587 F. 2d 1187 (D.C. Cir. 1978)). The court correctly held that the agency's affidavits must contain information specific enough to place the documents within the exempted category and that "if this information is not contradicted in the record, and if there is no evidence in the record of agency bad faith, then summary judgment is appropriate without *in camera* review of the documents" (Pet. App. 10a-11a). This approach, the court noted (*id.* at 11a), is consistent "with congressional intent that courts give

agency affidavits 'substantial weight,' in recognition of the agency's expertise." See S. Conf. Rep. No. 93-1200, 93d Cong., 2d Sess. 12 (1974).

The court's conclusion, with which petitioners take issue (Pet. 17), that it must have a "reasonable basis for finding potential harm from disclosure" (Pet. App. 12a) was simply a reference to the explict classification standards of Exec. Order No. 11652, which were retained unchanged in the superseding Exec. Order No. 12065. Those standards authorize "Top Secret" classification if disclosure of information "could reasonably be expected to cause exceptionally grave damage to the national security" and authorize "Secret" classification if disclosure "could reasonably be expected to cause serious damage to the national security." See note 1, *supra*. Accordingly, as the court of appeals recognized, a court engaged in de novo review to decide whether information is "properly classified" under the Executive Order and therefore exempt from disclosure under Exemption 1 must determine whether grave or serious damage to the national security "could reasonably be expected" to result from disclosure. The "reasonableness" element in judicial review therefore necessarily follows from Congress' decision, embodied in Exemption 1, to allow the Executive to establish the substantive standards for classification. In addition, of course, the court must determine that proper procedures have been applied in classifying the material and that the agency has described the material sufficiently to enable the reviewing court to make a responsible de novo decision. The courts below correctly held that NSA had met its burden.

2. *Exemption 3*

Petitioners' challenge (Pet. 18-19) to the court of appeals' alternative ruling that the material was properly withheld under Exemption 3 is frivolous (see Pet. App. 15a-19a). The legislative history makes clear that it was the unique and highly sensitive activities of NSA, requiring strict security measures, that impelled Congress to enact Section 6 of Pub. L. No. 86-36, 73 Stat. 64, exempting from disclosure "the organization or any function of the National Security Agency, of any information with respect to the activities thereof, or of the names, titles, salaries, or number of persons employed by such agency." See H.R. Rep. No. 231, 86th Cong., 1st Sess. 6 (1959). Functions and activities of NSA covered by this provision are "particular types of matters to be withheld" within the meaning of Exemption 3(B), and it is well established that Pub. L. No. 86-36, 73 Stat. 63, is an Exemption 3 statute. *Founding Church of Scientology* v. *NSA*, 610 F. 2d 824 (D.C. Cir. 1979); *Serbian Eastern Orthodox Diocese* v. *NSA*, Civ. Action No. 78-03 (D.D.C. July 13, 1978); *Baez* v. *NSA*, Civ. Action No. 76-1921 (D.D.C. Apr. 7, 1978); *Kruh* v. *GSA*, 421 F. Supp. 965 (E.D.N.Y. 1976).

The court of appeals correctly found that "[t]he public record in this case, even without the *in camera* affidavit, demonstrates that release of the documents would disclose a function of the NSA, since signals intelligence is one of the Agency's primary functions; and would disclose information with respect to Agency activities, since any information about an intercepted communication concerns an NSA activity" (Pet. App. 16a). Although petitioners assert that a "function" or "activities" of NSA might include such things as the agency's hiring practices or lobbying activities (Pet. 19), that contention does not

negate the fact that these terms clearly include the communications surveillance that would be revealed by the documents at issue here. Whatever else is encompassed by the secrecy requirement in Pub. L. No. 86-36, the core responsibility of the agency to collect intelligence information by interception of communications channels must surely be covered.[8]

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[8]Petitioners belatedly contend (Pet. 14-15) that NSA's affidavits are not based on personal knowledge, as they say is required by Fed. R. Civ. P. 54(e). Actually the citation should be to Fed. R. Civ. P. 56(e). In any event, that argument was not raised in the courts below and should not be considered by this Court.

Moreover, the particular affidavit to which petitioners apparently refer was not filed in connection with the instant case, but was instead filed in *Baez* v. *NSA*, Civ. Action No. 76-1921 (D.D.C. Apr. 7, 1978), and appended by petitioners to their reply brief in the court of appeals in this case (Reply Br. Addendum 1-5). That affidavit contains general statements, almost identical to those contained in the government's brief in the court of appeals (quoted at note 5, *supra*), that foreign targets assume their communications are not intercepted "probably" because they are aware that NSA can intercept but a small fraction of communications. A defect in an affidavit filed in another case, if there was a defect, obviously is not a basis for reversal here.

The affidavits in the present case contain the expert opinion of an intelligence officer equipped by his special knowledge and experience to assess the adverse consequences of disclosure of the documents. Furthermore, the recognized basis for classification of this information—that the government's interest in particular types or channels of communications would be revealed by their disclosure—is not dependent on the notion set forth in the *Baez* affidavit or the government's brief that foreign targets probably do not bother to encrypt their messages because they are aware of NSA's inability to intercept more than a small percentage of all communications. Even if they are not so aware of the limitations on NSA's capabilities, the national security would be injured by revealing which communications have been targeted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1980